Supreme Court, U.S.
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No. 07-1281

IN THE

Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully petition this Court to grant rehearing of the denial of their petition for a writ of certiorari on October 6, 2008.

GROUNDS FOR REHEARING

Petitioners seek rehearing to allow the Court to dispose of their certiorari petition in light of the Court's forthcoming decision in *Flores-Figueroa v. United States*, No. 08-108. The Court's decision in *Flores-Figueroa*—in which review was granted two weeks after the denial of certiorari in this case—is likely to address one of the questions raised in the petition in this case.

1. The factual and procedural history of this case are set forth in the petition for certiorari (at 2-11). In summary, petitioners were convicted for violating a provision of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1(a)(1), 78-dd-2(a)(1), by arranging for bribes to be paid to Haitian Customs officials in exchange for lowering taxes on imported rice.

The relevant provision of the FCPA prohibits the payment of bribes to a foreign official to induce official action "to assist [a covered American business] in obtaining or retaining business for or with . . . any person." 15 U.S.C § 78dd-1(a)(1). The district court initially dismissed the indictment against petitioners on the ground that a bribe directed at obtaining beneficial tax treatment is not a bribe to assist in "obtaining or retaining business" within the meaning of the Act. Pet. App. 120a.

On appeal, the Fifth Circuit reversed. The court of appeals acknowledged that the statutory text, viewed in light of the statutory structure and the provision's title, was "ambiguous as a matter of law." Pet. App. 67a. The court then closely examined the drafting and legislative history of the FCPA. It found nothing directly on point, but discerned from various indications in the legislative history a generalized intent to broadly proscribe bribery of foreign officials. *See* Pet. 4-7. In the end, the court concluded that "[g]iven the foregoing analysis of the statute's legislative history," it could not "hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts." Pet. App. 88a. The court declined, however, to decide whether that conclusion could be applied to this case in light of the rule of lenity, leaving the district court to address that question on remand. Pet. App. 100a n.96.

Upon remand, petitioners renewed their rule of lenity argument, which the district court rejected. Petitioners were subsequently convicted and appealed again.

On the second appeal, the Fifth Circuit rejected petitioners' argument that the admittedly ambiguous terms of the FCPA should be construed so as not to criminalize their conduct under the rule of lenity, applying circuit precedent which has reserved application of lenity to cases in which, "after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." Pet. App. 16a.

2. The petition for certiorari asked this Court to decide whether the rule of lenity is limited to cases in

which a court can only "guess" at Congress's intent. Pet. i. This Court denied the petition on October 6, 2008.

3. Two weeks later, the Court granted the petition in *Flores-Figueroa v. United States*, No. 08-108 (cert. granted October 20, 2008). The petition in that case presents the question "[w]hether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the Government must show that the defendant knew that the means of identification he used belonged to another person." *See* Pet. i, *Flores-Figueroa v. United States*. The petition explains that the courts of appeals have divided over the question, in large part due to the fact that two circuits have found the language of that statutory provision sufficiently ambiguous to warrant application of the rule of lenity, while three others have refused to apply the doctrine to the construction of Section 1028A(a)(1). *Id.* at 10-11. One of the decisions giving rise to the circuit conflict in *Flores-Figueroa* is discussed at length by the Petition for Certiorari in this case as embodying the conflict between the respective interpretations of the rule of lenity by the D.C. and Fifth Circuits. *See* Pet. 24, *Kay v. United States* 24 (discussing *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008). In another, *United States v. Miranda-Lopez*, 532 F.3d 1034, 1040 (9th Cir. 2008), the Ninth Circuit held—in direct conflict with the rule in the Fifth Circuit—that the rule of lenity applies to "resolve *any* ambiguity in the scope of the criminal statute," unless it would "require an interpretation that 'conflict[s] with the implied or expressed intent of Congress.'" *Id.* at 1040 (citation omitted).

4. The proper threshold of ambiguity to trigger application of the rule of lenity may be resolved—or at least be the subject of significant further guidance from this Court—in *Flores-Figueroa*. One of the petitioner's principal arguments in *Flores-Figueroa* is that the rule of lenity requires a ruling in his favor because the statutory text and structure is ambiguous and other indicia of legislative intent do not decisively resolve the ambiguity in the Government's favor. *See* Pet. 21, 27-28, *Flores-Figueroa v. United States*. And the Government has made clear, in its response to the petition in this case (BIO 15), that it views the Fifth Circuit's view of lenity—as limited to cases in which a statute is so hopelessly ambiguous that a court may only guess at its meaning—to be the correct one.

This Court's analysis of the rule of lenity in *Flores-Figueroa* is likely to have jurisprudential significance that will provide the lower courts with importance guidance in a range of cases, including this one. To date, the Court has articulated two competing standards for applying the rule of lenity. As the Petition in *Flores-Figueroa* explains (at 27), decisions such as *United States v. Bass*, 404 U.S. 336, 347 (1971), hold that in cases of ambiguity in criminal statutes, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." By contrast, as the United States urges in its Brief in Opposition in this case (at 15), the Court has also stated in cases such as *Ladner v. United States*, 358 U.S. 169, 178 (1958), that the "policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] . . . when such an interpretation can be based on no more than

a guess as to what Congress intended." The Fifth Circuit takes *Ladner*'s latter formulation *literally*, and disposed of the case on that basis. *See* Pet. 8.

There is no serious doubt that if this Court retains the *Bass* formulation and rejects strict application of the latter formulation from *Ladner* the judgment in this case must be reversed. As the Petition explains, even the court of appeals acknowledged that the statute under which petitioners were convicted "is ambiguous as a matter of law"; it held that it could "avoid the rule of lenity" only because the task of statutory construction was not reduced to mere "guesswork." Pet. App. 6a, 16a.

5. While rehearing is disfavored and rarely granted, the exception to that principle is that this Court has regularly granted rehearing when a previously denied petition raised a question related to the issues decided a case granted review shortly thereafter. In such cases, the Court has granted the petition for rehearing, vacated the prior denial of certiorari, granted the petition, vacated the judgment, and remanded the case for reconsideration in light of the Court's new precedent. *See, e.g.*, *Hawkins v. United States*, 543 U.S. 1097 (2005); *Criston v. United States*, 543 U.S. 1117 (2005); *Soto v. United States*, 543 U.S. 1117 (2005); *Jimenez-Velasco v. United States*, 542 U.S. 1116 (2005); *Friend v. United States*, 517 U.S. 1152 (1996); *Fuentes v. United States*, 516 U.S. 1022 (1995); *Adams v. Evatt*, 511 U.S. 1001 (1994); *Hitchcock v. Florida*, 505 U.S. 1215 (1992); *West v. Northwest Airlines, Inc.*, 505 U.S. 1201 (1992); *Booker v. Mississippi*, 472 U.S. 1023 (1985).

The same course of action is appropriate here. While the rule of lenity question in *Flores-Figueroa* arises with respect to a different statute, this Court's decision could well render untenable the Fifth Circuit's exceedingly narrow conception of the rule's application to any ambiguous criminal statute. As described in the petition in this case, if that narrow conception cannot stand, neither can petitioners' convictions. *See* Pet. 27-32.

Rehearing is particularly warranted given the importance of this case and the negative consequences of the Fifth Circuit's judgment for the American business community, as the two *amicus* briefs in support of the Petition attest. The brief of the U.S. Chamber of Commerce in particular demonstrates that the Fifth Circuit's decision in this case radically expands the extraterritorial sweep of the FCPA in a manner that could not reasonably have been anticipated and that has significant adverse effects on American industry.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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October 31, 2008

CERTIFICATE OF COUNSEL

Counsel certifies that the foregoing petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2 and is presented in good faith and not for delay.

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